BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JULIAN ROAN Claimant VS. **KAN-PAK, LLC.** Respondent AND **STANDARD FIRE INS. CO. and TRAVELERS INDEMNITY CO. OF AMERICA** Insurance Carriers	)	Docket No. 1,046,250

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carriers (respondent) requested review of the September 15, 2009, preliminary hearing Order and the September 16, 2009, Nunc Pro Tunc Order entered by Administrative Law Judge John D. Clark. James B. Zongker, of Wichita, Kansas, appeared for claimant. William L. Townsley, III, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant was injured in an accident that arose out of and in the course of his employment and that claimant gave respondent notice of the accident within 10 days. Accordingly, the ALJ awarded claimant temporary total compensation and ordered Dr. John Gorecki to be his treating physician.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the September 15, 2009, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of the ALJ's finding that claimant suffered an injury that arose out of and in the course of his employment and that claimant gave respondent timely notice of his alleged accident.

Claimant requests that the ALJ's Order and Nunc Pro Tunc Order be affirmed.

The issues for the Board's review are:

(1) Did claimant suffer an injury by accident or accidents that arose out of and in the course of his employment at respondent?

(2) If so, did claimant give respondent timely notice of his accident or accidents?

FINDINGS OF FACT

Claimant worked for respondent stacking boxes onto pallets. The job required him to bend, stoop, twist, and lift about 700 20 to 25-pound boxes per hour. On Friday, March 6, 2009, claimant experienced low back pain while at work. Although he reported his pain that day to a coworker, he did not report it to his supervisor. When he returned home after work, he was unable to get out of his truck. He honked his horn so that he could wake up his mother. She helped him get out of his truck and into the house.

Claimant rested at home over the weekend. By Monday, he was experiencing pain in his low back that was going down his left leg. He called his family physician, Dr. Ratnesh Chopra, and made an appointment to be seen the next day. He also called his supervisor and said he could not come in to work because of back pain. Claimant saw Dr. Chopra on Tuesday, March 10. Dr. Chopra's note of that date states that claimant complained of "back pain yesterday, was lifting." The note also mentions that he was stepping out of his truck. Claimant acknowledged that he did not tell Dr. Chopra that he had a work injury. He denied telling Dr. Chopra he was injured while stepping out of his truck.

Claimant returned to work on Wednesday. Claimant's mother said that Dr. Chopra had given claimant restrictions, and she and claimant gave respondent the restriction slip.[1] They did not ask to have this reported as a workers compensation claim at that time because they did not know what was the matter with claimant. Respondent put claimant on a light duty job putting bags in a machine, which, although light duty, required him to perform repetitive bending, stooping, lifting and twisting. As claimant continued working,

[1] Both claimant and his mother testified that claimant has a learning disability, so his mother does a lot of things for him, such as paying his bills and keeping him organized.

the pain in his back got worse. Claimant said he made that known to his supervisors, Kyle McClung and Timothy Hilario.

An MRI was ordered by Dr. Chopra, and it was performed on March 17, 2009. The MRI showed that claimant had degenerative disc changes at L4-5 and L5-S1 that were out of proportion to his young age. The MRI also showed he had a disc bulge and disc herniation at L4-5 and a disc bulge at L5-S1 with protrusion. After the MRI was performed, Dr. Chopra took claimant off work and referred him to Dr. John Gorecki.

Claimant testified that he attempted to fill out an accident report with respondent within 10 days of his injury but was told that it was too late to be reported as a work injury. Claimant's mother testified that on March 18, after receiving a note from Dr. Chopra about the results of the MRI, she and claimant went to respondent and spoke with Jennifer Moore, respondent's human resources manager, to ask about reporting this as a workers compensation claim. She said that Zack Lancaster, respondent's safety manager, was present at this meeting. Claimant's mother testified that Ms. Moore said it was too late to file a workers compensation claim because claimant had not reported his injury as a work injury from the beginning. Ms. Moore denied meeting with claimant and his mother on March 18 and testified that the first time she met them was on March 31, 2009. She testified she knew that claimant was off work from March 18 to March 27 because of back problems, but she did not have a copy of his off-work slip.

On March 31, Dr. Gorecki recommended that claimant have surgery. Claimant and his mother went in to respondent on March 31 and again spoke with Ms. Moore. Claimant testified that he and his mother told Ms. Moore they were there to report a work-related injury. His mother, however, testified that on March 31 she and claimant spoke with Ms. Moore in order to inform her that claimant was going to have surgery.

Ms. Moore testified that claimant and his mother came in to see her on March 31 with a doctor's note saying he was going to be off work for 12 weeks because he was going to have surgery. Ms. Moore said that claimant and his mother asked her about short-term disability. Ms. Moore checked her records and then told them that claimant did not have short-term disability insurance. After she gave them that information, they told her that claimant had a work-related injury. Ms. Moore said she asked them if they had reported an accident, and they said no. At this point, Ms. Moore said she asked Mr. Lancaster to investigate the matter. She also testified she may have told claimant and his mother that they were past the 10-day period to timely report a workers compensation claim. Ms. Moore has never filed any paperwork with the Workers Compensation Division concerning claimant's case.

Mr. Lancaster said he first became aware that claimant was claiming a work-related injury on March 31, 2009, after getting an email from Ms. Moore asking him to set up an appointment with claimant to discuss the claim. Mr. Lancaster called both of claimant's supervisors and other people in claimant's work area asking if they had knowledge that

claimant had a work-related injury. He also spoke with claimant and his mother. Mr. Lancaster said that claimant's supervisors denied that claimant had reported a work-related injury.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[2] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[3]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[4]

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[2] K.S.A. 2008 Supp. 44-501(a).

[3] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[4] *Id.* at 278.

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 44-520 provides that notice may be extended to 75 days from the date of accident if claimant's failure to notify respondent under the statute was due to just cause. In considering whether just cause exists, the Board has listed several factors which must be considered:

(1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.

(2) Whether the employee is aware he or she has sustained an accident or an injury on the job.

(3) The nature and history of claimant's symptoms.

(4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident and whether the respondent had posted notice as required by K.A.R. 51-13-1.

K.S.A. 2008 Supp. 60-206(a) states:

> In computing any period of time prescribed or allowed by this chapter, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. When the period of time prescribed or allowed is less than 11 days, intermediate

> Saturdays, Sundays and legal holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday. "Legal holiday" includes any day designated as a holiday by the congress of the United States, or by the legislature of this state, or observed as a holiday by order of the supreme court. When an act is to be performed within any prescribed time under any law of this state, or any rule or regulation lawfully promulgated thereunder, and the method for computing such time is not otherwise specifically provided, the method prescribed herein shall apply. [5]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[7]

ANALYSIS

In his Application for Hearing and Application for Preliminary Hearing, claimant alleged a series of accidents from March 8, 2009, to March 17, 2009,[8] but at the preliminary hearing, claimant claimed an accident date of March 6, 2009.[9] The ALJ found that claimant suffered a single work-related accident on March 6, 2009, not a series of accidents or aggravations. The ALJ further determined that "Respondent had notice within ten days of the accident when he [claimant] notified his supervisors, Tim and Kyle."[10] The ALJ apparently found the testimony of claimant and his mother to be more credible than that of respondent's witnesses. Generally, the Board gives some deference to the ALJ's determination of credibility when he had the opportunity to view the witnesses testify in person. In this case, the ALJ witnessed the in-person testimony of claimant, his mother, Jennifer Moore and Zack Lancaster. Accordingly, the ALJ's conclusions concerning credibility are entitled to weight and will be taken into consideration.

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[5] See *McIntyre v. A.L. Abercrombie, Inc.*, 23 Kan. App. 2d 204, 929 P.2d 1386 (1996).

[6] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[7] K.S.A. 2008 Supp. 44-555c(k).

[8] Form K-WC E-1, Application for Hearing, filed June 26, 2009; Form K-WC E-3, Application for Preliminary Hearing, filed June 25, 2009.

[9] P.H. Trans. at 5.

[10] ALJ Order (Sept. 15, 2009); ALJ Nunc Pro Tunc Order (Sept. 16, 2009).

Having reviewed the entire record compiled to date, this Board Member agrees with the ALJ that it is more probably true than not that claimant suffered a low back injury at work on March 6, 2009, as alleged. However, whether claimant has proven that he gave his employer timely notice of that injury is a closer question. Claimant admits he only told a coworker named Bob of his injury on Friday, March 6, 2009. Claimant called in on the following Monday, March 9, 2009, and advised his "supervisor" of his symptoms and of his appointment with Dr. Chopra, but claimant did not testify that he reported an accident or that his injury was work related at that time. When claimant returned to work on Wednesday, March 11, 2009, he gave his supervisor Dr. Chopra's restrictions and was put on light duty.[11] Claimant said this work, nevertheless, made the pain in his back worse, and he made this known to his supervisors, Kyle and Tim. However, claimant again did not say that he reported to them that his original injury was work related.

Furthermore, at the preliminary hearing, counsel for claimant claimed a single date of accident of March 6, 2009, not a series. The first time claimant said he reported a work-related accident was when he and his mother met with Jennifer Moore. Although claimant said this occurred within 10 days of his accident, he also said that he and his mother talked to Jennifer the same week that he saw Dr. Gorecki. Claimant saw Dr. Gorecki on March 27. However, claimant also said this was the Tuesday after his Friday accident, within about six days, so claimant was probably referring to Dr. Chopra, who he saw on March 10, rather than Dr. Gorecki.[12] Claimant's mother testified that they reported the injury was work related when they took in claimant's restrictions from Dr. Chopra and again on March 18, when they met with Jennifer and tried to file an accident report or workers compensation claim. Claimant's mother testified that they met a second time with Jennifer on March 31 to let her know claimant was going to have surgery.

Excluding intervening Saturdays and Sundays as required, March 18 is within 10 days of March 6, 2009. This Board Member finds Ms. Roan's testimony persuasive and finds she and claimant reported claimant's March 6, 2009, injury was work related on March 18, 2009.

CONCLUSION

(1) Claimant sustained personal injury by accident on March 6, 2009, that arose out of and in the course of his employment with respondent.

(2) Claimant gave timely notice of his accident.

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[11] Mr. Lancaster testified that the supervisor claimant talked to on March 9 or 10 was Candice Stewart.

[12] Claimant had confused Dr. Chopra with Dr. Gorecki earlier in his testimony. See P.H. Trans. at 9.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated September 15, 2009, and the Nunc Pro Tunc Order dated September 16, 2009, are affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2009.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: James B. Zongker, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent and its Insurance Carriers
John D. Clark, Administrative Law Judge